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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

SAMUEL JOSEPH RUGENDORF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel Joseph Rugendorf, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on April 30, 1963.

JUDGMENT AND OPINION OF THE COURT BELOW

On April 30, 1963, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to imprisonment for a term of ten years. The Court of Appeals' opinion has not as yet been reported. It is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial, defendant was convicted of receiving and concealing merchandise of a value in excess of $5,000.00, knowing the same to have been stolen in violation of Section 2315, Title 18, U. S. Code.

On appeal to United States Court of Appeals of the Seventh Circuit, the judgment of conviction was affirmed by an opinion filed April 30, 1963 (Appendix "A").

A petition for rehearing was timely filed, and was denied on May 24, 1963. (Appendix "B").

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the so-called "informer's privilege" against disclosure, extend to any matter not related to the identity of the informer?

If so, what is the limit of the reach of the privilege?

And does the "privilege" ever authorize the withholding of facts which might establish innocence and which would not compromise the identity of the informant?

2. May a conviction on a charge of receiving stolen property, Title 18 U.S.C. Sec. 2315, be predicated entirely and solely upon proof that stolen property was found on premises partially occupied and partially owned by defendant, but to which a number of others also had access?

3. Where a defendant has never before been arrested or charged with a crime; and where the defendant makes a strong and uncontested showing of previous good character; and where the police testimony establishes that the defendant is not known to be engaged in any form of criminal activity; then,

May disclosure of the identity of an informant be withheld because of the prosecutor's unexplained and unsupported assertion that such disclosure "might and probably would" result in the informant's death?

4. May the disclosure of the identity of an informant, or other facts concerning his activities, be compelled only if the informer is first proven to have been a moving party in the commission of the crime, and under no other circumstances whatever?

5. May the disclosure of facts relating to an informant be withheld in all proceedings wherein a defendant seeks to invalidate a search warrant obtained on information supplied by that informant, simply by reason of the nature of the proceedings and without regard to any other consideration whatever?

STATUTES INVOLVED

Title 18 U. S. Code Section 2315. (Relevant portion set out in Appendix "C").

STATEMENT OF THE CASE.

Defendant and his wife own and occupy a single family dwelling in Chicago, Illinois. In the basement of the residence was a recreation room, with closets built into the north wall. (A. 30-31).

On February 17, 1962, defendant and his wife left Chicago for a vacation. They returned on March 4, 1962. During their absence, defendant's brother, Leo Rugendorf, his sister, and one Roskin, a neighbor, all had keys to defendant's home for any necessary emergency entrance, service, mail removal or other purpose. (A. 30, 39).

On his return from his vacation, defendant resumed his business activity. He operated a meat market 19 miles from his residence. It was his practice to arise about 5:30 in the morning, spend the entire day in his store, and return to his home about 8:30 P.M. (A. 39-40).

Both defendant and his wife testified that at no time between their return from their vacation on March 4th and the defendant's arrest on March 22, did either have occasion to enter the closets in the basement. (A. 32, 40).

On March 22, an affidavit was filed by an F.B.I. agent before the United States Commissioner in support of an application for a warrant authorizing the search of the basement of defendant's residence. (A. 6-8). This affidavit recited:

(a) That the affiant had been informed that certain fur garments had been stolen in Alabama valued in excess of $5,000.

(b) That the affiant had been informed that a previously reliable informant had told another agent that certain persons, Schweihs, Panzica and Condic "were accom-

plished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf," the brother of the defendant.

(c) That a previously reliable, unnamed confidential informant had told affiant on March 16, 1962, that he saw approximately 75 to 80 fur garments in the basement of the defendant's home, and had been told that the furs were stolen.

(d) That according to F.B.I. records, the only burglary of furs of this type of a value in excess of $5,000 during the past six months was the Alabama burglary.

(e) That still another agent, one McCormick, had told affiant that an unnamed previously reliable confidential informant had stated that Schweihs had committed the Alabama burglary.

(f) That McCormick had also told affiant that policeman James Kelleher said "that he saw Frank Schweihs at Rugendorf Brothers Meat Market managed by Samuel Rugendorf."

(g) That the same agent had told affiant that yet another unnamed previously reliable confidential informant had stated "that Leo Rugendorf was a fence for Frank Schweihs, that Samuel Rugendorf was Leo Rugendorf's brother and was associated in the meat business with his brother."

Based upon this affidavit, a search warrant was issued (A. 4-5) and served on defendant's wife. (A. 5). (Defendant, at the time, was at his place of business. A. 29). 82 furs were found in the basement closet. Defendant's wife expressed surprise, identified one of the furs as her own, and surrendered the remainder to the officers. (A. 16).

Defendant was thereupon arrested. He denied all knowledge and complicity. (A. 40-45).

Defendant moved to quash the search warrant and suppress the evidence, alleging that the affidavit was false and that it was insufficient to support a search. (A. 1-3).

The motion to quash and suppress, filed in advance of the trial, was heard at the conclusion of the prosecution case. (A. 17). The case for the prosecution consisted, in its entirety, in:

1. A stipulation that the Government exhibits were furs stolen in two separate thefts in Louisiana and Alabama, and were valued in excess of $5,000. (A. 15).

2. The testimony of F.B.I. agetn Moore that he executed a search warrant at defendant's home and found the furs there. (A. 15, 16).

At the commencement of the trial the defense requested the name of the confidential informant described in the affidavit for the search warrant as necessary to a proper defense or a proper attack of the search warrant. (A. 13). In support of this request, defense counsel stated that the identity was necessary to the defense because the informant, as a witness, would necessarily demonstate that the defendant had nothing to do with the crime, and that even the Government should be interested in calling the informant as a witness, since the informant obviously would have some knowledge as to whether the defendant was guilty. (A. 14). The Court denied this request. (A. 15).

At the hearing on the motion to suppress policeman Kelleher denied that he had stated that Rugendorf Brothers Meat Market was managed by the defendant. (A. 17).

Defendant testified that he was engaged in the grocery and meat business several miles from the Rugendorf Brothers Meat Market, with which he had no connection whatever. He had not been to the Rugendorf Brothers Meat Market for the past eight years. (A. 19).

An employee of Rugendorf Brothers Meat Market who had worked there for four years stated that he had never seen defendant at that place of business. (A. 21). Another witness, the manager of Rugendorf Brothers Meat Market since 1948, also testified that defendant had no connection with that business. (A. 21).

Defendant called F.B.I. agent Moore, as a witness, who testified that he was the agent in charge of the case and that he had had a conversation with the confidential informant. He was then asked "where did you have this conversation with this confidential informant?" The prosecution objected, stating that the Government could not reveal the name of the informant "because it would cause a possible murder." The objection was sustained. (A. 22).

Successive objections, assigning the same reason were sustained to each of the following questions:

"What is the name of this man?"

"Where is he now?"

"On what day did he say he saw the furs in the basement of the home of Sam Rugendorf?" (A. 22).

The defense argued that the statement that on March 16, informant stated that he had seen the furs "within the past week," left a substantial period of time during which the defendant's whereabouts would have to be accounted for, and that the defense sought to narrow the area of proof. Counsel further contended that the information was necessary to petitioner's defense. (A. 23).

The defense further argued that the affidavit for the search warrant had been proved to be false in two particulars, and that it was proposed to demonstrate, by the questions objected to, still further falsity. The Court, however, expressly foreclosed any further questioning of the witness Moore (A. 24), denied the motion to quash the warrant and suppress the evidence, and admitted the furs into evidence, ruling:

> "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury." (A. 25).

The defense introduced evidence, not contested or rebutted, showing defendant's good reputation (A. 26-28) his absence from Chicago in February and March of 1962, and the holding during that period of keys to his residence by his brother Leo and others. Defendant and his wife both testified, denying any knowledge of the presence of the furs in their home and of any transaction relating thereto. (R. 30-34 and 37-45).

Defense motions for acquittal were denied (A. 9-10) and a judgment of conviction was entered on a jury verdict finding defendant guilty (A. 67). Defendant was sentenced to ten years' imprisonment.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Does the so-called "informer's privilege" against disclosure, extend to any matter not related to the identity of the informer?

If so, what is the limit of the reach of the privilege? And, does the privilege ever authorize the withholding of facts which might establish innocence?

* * *

Where a defendant has never before been arrested or charged with a crime; and where the defendant makes a strong and uncontested showing of previous good character and reputation; and where police testimony establishes that the defendant is not known to be engaged in any form of criminal activity; then,

May disclosure of the identity of an informant be withheld because of the prosecutor's unexplained and unsupported assertion that such disclosure "might and probably would" result in the informant's death?

* * *

May the disclosure of the identity of an informant, or other facts covering his activities, be compelled only if the informer is first proven to have been a moving party in the commission of the crime, and under no other circumstance whatever?

* * *

May the disclosure of facts relating to an informant be withheld in all proceedings wherein a defendant seeks to invalidate a search warrant obtained on information supplied by that informant, simply by reason of the nature of the proceedings and without regard to any other consideration whatever?

Without heat, and in the exercise of responsible and considered advocacy, we feel free to characterize the outcome of this litigation in the courts below, as an obvious and a terrifying injustice.

The holding of *Roviaro* v. *United States*, 353 U.S. 53, has generated a flurry of inventive activity in a search for mechanistic slogans designed to circumvent the effect of that decision.

The fate of the petitioner here is not the first consequence of that search. It will not be the last. But we know of no case which brings into sharper focus, the widespread mischief resulting from the quest for evasion of *Roviaro*.

In this aspect, police activity may have been self-defeating. It is a remarkable circumstance that at the very time when the government feels the strongest need to avoid compromise of the identity of its informants, it has experienced the misfortune of acquiring, on a nationwide basis, a legion of confidential sources so startlingly homogenous that any member of the group must be instantly recognizable by his peculiar characteristics.

For example, an informant, almost by definition, "has furnished reliable information in the past." (A. 8). This information may not have related to crimes. Numberless other subjects suggest themselves: weather, moral judgments, travel directions. But the information was always "reliable"—*i.e.*, the police believed it.

Another distinguishing feature of the informant is his paranoid dread of assassination. (A. 15). Neither the defendant's firmly established reputation for probity and honesty, nor the massed power of society organized for

his protection, will mitigate in the slightest degree the certainty of the informer's bloody doom, once his identity becomes known.

A third astonishing quality is the informant's ability to become privy to the darkest secrets of the underworld, while retaining complete integrity. Not only is his information consistently reliable, but it always relates to a crime in which he is not involved, so that his testimony could not possibly help the defendant. He is ". . . an informer and nothing more." *Miller* v. *United States*, 5 Cir., 1959, 273 F. 2d 279, 281. He has nothing to contribute ". . . to a fair determination of the cause." *United States* v. *Whiting*, 4 Cir., 1962, 311 F. 2d 191, 195. He did not help "to set up the commission of the crime and . . . was [not] present at its occurrence." *Jones* v. *United States*, D.C. Cir., 1959, 271 F. 2d 494, 496. We know these things about him, although nobody tells us so, because the defendant is unable to prove that the contrary is true.

The confidential informant also has an amazing talent for providing the very piece of information which is needed to be joined with other facts, in order to form the basis for a warrant. The warrant generates a search. The fruits of the search result in the defendant's imprisonment. Therefore, the informer's identity is not material, because it is "wanted in support of the effort to invalidate the search warrant." *United States* v. *Whiting*, 4 Cir., 1962, 311 F. 2d 191, 196.

The confidential informant is a remarkable fellow.

His name is "Anonymous". *Gilmore* v. *United States*, 5 Cir., 1958, 256 F. 2d 565, 566.

Infrequently, but often enough to be disturbing, he manifests his most remarkable quality of all: He does not exist. *United States* v. *Pearce*, 7 Cir., 1960, 275 F. 2d 318, 322.

Armed with these unique abilities, Anonymous has found it child's play to avoid the effect of your Honor's decision in *Roviaro*. If anything, *Roviaro* has had a therapeutic, an immunizing effect on Anonymous. The affliction, once felt in a mild form, cannot strike the organism again. Anonymous has learned his lesson, and has emerged with augmented vigor from his bout with legal cowpox, *virisque adquirit eundo*.

With his new-found powers, Anonymous has set his sights on far bigger game than *Roviaro*. His present ambition, already fulfilled in large part, is to render nugatory the Constitutional guarantees against unlawful search and seizure.

His confidences are reserved for policemen, so we are unable to say with certainty where he plans to go from there. But the destination is, we feel, readily to be predicted by any student of government.

• • •

Anonymous was enabled to condemn petitioner to ten years of imprisonment, by virtue of his power to invoke the characteristic of "immateriality" wherever convenient.

The government affidavits fairly scream the intelligence that Anonymous knows, not only who stole the furs, but who put them in the petitioner's basement. He knows whether petitioner is innocent or guilty. And for that reason, petitioner desperately sought to examine Anonymous.

It is perfectly clear from the government's affidavits, that not a syllable nor a punctuation mark need have been different if the informer had said that he himself had placed the furs in petitioner's basement without petitioner's knowledge.

In its effort to obtain the names of the informers, the defense told the court previous to the hearing on the petition, that it would demonstrate that certain matters in the affidavit were false (A. 13). The defense proved that an informant falsely said, as reported in the affidavit, that Sam Rugendorf was in the meat business with Leo Rugendorf. (See testimony of Cramsie and Siegel, A. 21.)

The defense proved the affidavit falsely said that officer Kelleher told agent McCormick that Sam Rugendorf managed the Rugendorf Meat Market. (See testimony of Kelleher, A. 17.)

The defense particularly sought the identity of the informant claimed in Moore's affidavit to have revealed to Moore the presence of furs in Sam's basement and the fact that such furs were stolen.

In denying the defense's request, the court observed that even if part of the affidavit were false the rest was true *because the garments were found there* (A. 25). In short, the court justified the search, not on the basis of the affidavit, but on the basis of what was found. But a search cannot be justified as lawful merely because it results in the disclosure of incriminating evidence. *United States* v. *DiRe*, 332 U.S. 581, 595. If the rule were otherwise, a petition to suppress could literally never succeed. Moreover, the trial court was mistaken in assuming the truth of that portion of the affidavit referring to the furs in the basement. The affidavit did not state as a fact that there were furs in the basement. The affidavit stated the fact to be that an unnamed person said there were furs in the basement. That is, the inquiry to be made in the hearing was not as to whether the furs were or were not there. The inquiry was to determine whether the agent was *told* the furs were there, as he said in his affidavit, and whether the person who gave the information, if he did, actually saw them there or was merely told they were there.

The defense was not even permitted to find out where the conversation between agent and informant took place, or the date the informant saw the furs in the basement, much less the informant's name (A. 22).

If a defendant is not permitted to inquire into the matters implicit in the affidavit in support of a warrant, he is deprived of his right to move to suppress the evidence. In this case, there is no reason to suppose that the confidential informant did not break into the basement at the direction of the government prior to the date of the warrant. In that case, the affidavit itself would follow as a product of an illegal trespass by the government, so that it could not support the issuance of a warrant. We do not say this happened. We do not know. But neither can the government now say to this Court that it did not happen.

The obvious way to have resolved such doubts was to permit a full hearing in the trial court. But a full hearing could not occur where the government took sanctuary as to the informant's name, and as to all of the events surrounding his activities.

In *Roviaro* v. *United States, supra,* 353 U.S. 53, your Honors held that the informer's identity, or the contents of his communication, must be disclosed where "relevant and helpful" to the accused or "essential to fair determination of the cause." (*Roviaro,* 60-61). Your Honors also acknowledged the practice of requiring the disclosure of an informant's identity in matters involving searches and seizures. (*Roviaro,* 61).

United States v. *Pearce,* 7 Cir., 275 F. 2d 318 demonstrated the necessity of the requirement that the government identify its informants in this situation. In *Pearce,* had the government not been required to identify its informant, the falsity of the agent's affidavit would never

have come to light and the defendants' conviction might then have been affirmed. But the informer's identity was revealed. His relation, or lack of it, to the agent was revealed, and the warrant collapsed for want of probable cause.

In the case at bar, however, the Seventh Circuit apparently adopted the new Fourth Circuit rule that disclosure of the identity of an informant cannot be compelled in any proceeding in which a search warrant is sought to be invalidated. In that behalf, the Court of Appeals cites *United States* v. *Whiting*, 4 Cir. 1962, 311 F. 2d 191, 196. The basis for such a rule is not apparent. Simply stated, it would mean that a defendant is entitled to know the identity of an informant only where he can show that such information will help him prove the substantive fact of his innocence. He cannot, however, obtain this information where its only effect would be to enable him to assert a fundamental constitutional right. This is fearful doctrine indeed. Basic liberties are preserved only by a concern for procedural safeguards. The Fourth Circuit rule (now apparently approved by the Seventh Circuit) would badly downgrade a procedural safeguard of explicit constitutional dimensions.

In *Costello* v. *United States*, 9 Cir., 298 F. 2d 99, 102, the court said, in part, "A reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, *or no real judicial check would over take place.* The refusal of the trial court, upon appellant's request, to require disclosure of the name of the informant under these circumstances was error." (Emphasis added.)

We urge that your Honors make it clear that the Ninth Circuit view, as expressed in *Costello,* is the correct one, and that the view of the Fourth Circuit as stated in *Whiting,* and as adopted by the Seventh Circuit here, is not constitutionally sound.

The defense in this case requested the informant's name and for permission to go into the facts as set out in the affidavit (A. 24). The trial court told defense counsel that he was *foreclosed* from touching upon those matters (A. 24), unless the government offered the informant as a witness (A. 23).

The government knew a good thing when it saw it. It did not offer the confidential informant as a witness.

We earnestly urge that where *all* of the material information in the affidavit came from confidential informers, once removed and twice removed; whole chains and relays of them; and where as here, *not one item* in the affidavit was based on affiant's personal knowledge, then the least that can be required of the government is that it make such disclosures as would permit the defense to probe. Here, the defense proved part of the affidavit false. In view of demonstration that certain parts of the affidavit were false, it seems probable that had defendant not been foreclosed, it might well have been shown to be false that an informant was ever actually in defendant's basement, as affiant claimed, or ever told the affiant agent that he had been there. And it seems equally probable that matters of substantially greater gravity, although of contrary import, might have been proven.

* * *

It is hoped that your Honors will take a serious view of the affidavit filed in support of the application for a warrant authorizing the search of petitioner's home. It

is further hoped that your Honors will take an even more serious view of the government's stated attitude toward the sanctity of its affidavit and the responsibility of its affiant.

F.B.I. Agent Marlin Moore swore before the Commissioner that on information and belief stolen furs affected with interstate commerce were in appellant's basement (A. 6). He based his belief (and the warrant issued) on certain "facts." Each such "fact" was hearsay. No "fact" was corroborated by any information within the personal knowledge of affiant.

The matters sworn to were:

(1) That an FBI agent in Alabama told affiant of an Alabama burglary on February 10, 1962, involving fur capes and stoles (A. 6-7).

(2) That a previously reliable informant relayed information to affiant, through another agent, that one Schweihs committed the Alabama burglary (A. 7).

(3) That police officer Kelleher relayed information to affiant through another agent, McCormick, that on March 1, 1962, he saw Schweihs at Rugendorf Bros. Meat Market, managed by defendant, at 2449 South Wentworth, Chicago (A. 7).

(4) That another previously reliable informant relayed information to affiant, through another agent, that defendant's brother, Leo Rugendorf, was a fence, and that Leo and defendant Sam were associated in the meat business (A. 7).

(5) That, yet another previously reliable informant told another agent who told affiant, that Schweihs and others were burglars and fenced goods with Leo Rugendorf (A. 8).

(6) That on March 16, 1962, an informer who had furnished reliable information in the past told affiant that he had seen 80 fur garments in defendant's basement a few days previously, describing them as mink, otter and beaver jackets, with labels removed (A. 8).

(7) That the same informant told affiant that he, the informant, "had been told" the furs were stolen (A. 8).

(8) That descriptions of all furs stolen in the United States valued in excess of $5,000.00 are reported to the FBI (A. 8).

(9) The affiant reviewed FBI files and the only burglary in excess of $5,000.00 in the United States in the preceding six months involving furs similar to those described by the confidential informant, were the furs taken on February 10 in Alabama (A. 8).

The court will observe that items 2 to 5 contain no facts from which wrongdoing on the part of the defendant, Sam Rugendorf, might be inferred. Those averments are merely a sermon whose underlying theology (horizontal corruption of the blood) urges that Sam Rugendorf must be stamped with criminality because his brother Leo was a reputed scoundrel.

Items 8 and 9 are inserted to create an inference that the furs in defendant's basement *must* have been taken from Alabama because the Alabama furs (which affiant never saw) were similar in description to those (which affiant never saw) described by the informant. And besides, the agent looked at his record and could not find any other burglaries in the preceding six months. Therefore assuming, in the absence of any facts whatever that the furs were stolen in the last 6 months, they had to be the Alabama furs.

Items 6 to 8 place furs in defendant's basement. There was nothing about the furs themselves that proclaimed a stolen character. But, said the sometimes reliable informant, he had been *told* that the furs were stolen. The informant did not divulge the source of his information. Whether the unidentified informant's unidentified informant had given "reliable information in the past" does not appear.

We do not contend that warrants cannot be based in part on hearsay. Thus, in *United States* v. *Guido,* 7 Cir. 251 F. 2d 1, it was held that affidavits in support of a warrant might consist partly in hearsay, provided other matters appeared of affiant's own knowledge. *Jones* v. *United States,* 362 U.S. 257, 271 concludes lingering doubts. Hearsay may provide part of the basis for a warrant if there was " . . . a substantial basis for crediting the hearsay." (*Jones,* 272).

In *Jones,* the policeman affiant swore to information personally known to him. His affidavit stated that the persons whose premises were to be searched for narcotics had previously admitted their drug addiction to him. And he had seen needle marks on their bodies. The informant had previously given accurate information, and his story was corroborated by other sources of information. (*Jones,* 271).

Thus, in *Jones,* the fact satisfied the standards imposed by the Court. The officer properly relied " . . . upon information received through an informant rather than upon his direct observations . . . [because] the informant's statement [was] reasonably corroborated by other matters within the officer's knowledge." *Jones* v. *United States,* 362 U.S. 257, 269. Similarly, in *Draper* v. *United States,* 358 U.S. 307, 313, probable cause ensued where information from an informer was corroborated by information based upon personal observations made by an agent.

Contrast the situation in the instant case. The informant was not corroborated by other information. He was corroborated by the agent's naked guess that the furs allegedly seen by the informant, but not by the agent guesser, were similar to those stolen in Alabama.

In *Jones* v. *United States*, 362 U.S. 257, the party to be searched was known by the police to be addicted to drugs. That fact, personally known to the officer affiant, rendered probable the notion that he might be likely to possess drugs as claimed by the confidential informer. In this case, defendant Sam Rugendorf was not known by the police, or by any agent of the FBI to have any personal characteristics which might render probable his commission of any offense whatever.

Lacking such collateral corroboration the agents hunted around for another "usually reliable" confidential informant from their list of such persons. They were lucky enough to find the very man for the job. Leo Rugendorf, he said, was a fence. And Sam Rugendorf was Leo's brother. And Sam was associated with Leo in the meat business.

The Commissioner was invited to hazard that defendant Sam, having made a conscious biological choice of the same parents selected by Leo, similarly selected Leo's moral standards. To demonstrate the likelihood that Sam followed the same illegitimate activities as Leo, the affiant claimed the confidential informant told him that Sam and Leo were together in the meat business.

The reliability of "usually reliable" confidential informants was shaken by Clarence Cramsie (A. 20) and Max Siegel (A. 21) both employed at the meat market, and both of whom testified without contradiction that Sam Rugendorf had never been in the market and had no interest in the business.

The reliability of relayed hearsay is punctured by agent Moore's affidavit that agent McCormick relayed a statement by officer Kelleher that Sam managed the meat market. For officer Kelleher testified that he did *not* tell McCormick that the meat market was managed by Sam (A. 7).

The government tendered a remarkable apologia in response to this uncontradicted proof that its affidavit was false. In its brief in the Court of Appeals, the government pointed out that the affidavit said that:

> " . . . Kelleher told McCormick that he saw Frank Schweihs at Rugendorf Brothers Meat Market, managed by Samuel Rugendorf . . . "

The government explained, in its brief (p. 18):

> " . . . (T)his portion of the affidavit does not state that Officer Kelleher told Agent McCormick that Sam Rugendorf managed Rugendorf Brothers Meat Market, but merely states that Kelleher had seen [Schweihs] at Rugendorf Brothers Meat Market . . . (T)he actual truth of such information is irrelevant when considering whether there was probable cause for the issuance of the warrant . . . "

And at last, the matter comes out into the open. How much faith can we have in any such affidavit? The document is merely a formality that must be observed in order to obtain a warrant. Like the phrase "very truly yours" at the end of a sales promotion letter, it is a ritualistic formula, a small part of a broad effort which must be judged only by its results. To examine it for truthfulness is unfairly to restrict the scope of this highly pragmatic art form. It is designed only to be signed, not read.

We will be equally pragmatic. The ultimate truth of this case was, we feel, unconsciously disclosed by the prosecutor when he claimed that disclosure of any fact

concerning the informant—even the place where he spoke to the policeman—"would cause a possible murder." (A. 22)

Relying completely upon the prosecutor's sense of responsibility, we must presume that this was not a mere catch phrase, designed to elicit visceral indignation at the sacrifice of legal principle.

Very well, then. Anonymous would probably be murdered if the court were told the date on which he saw the furs in petitioner's basement (A. 22). But murdered by whom? Certainly not by petitioner, who has never in his 55 years been suspected of any form of illegal activity, much less of murder.

Yet, the informant would be murdered if identified. And *Leo,* petitioner's brother, is a known fence and associate of hoodlums, from whom, presumably, such violence is to be expected.

At best, then, petitioner is being punished for being Leo's brother. The government did not invoke its privilege on the basis of materiality, but on the basis of fear for the life of the informant. Had petitioner not been Leo's brother, he could probably have found out who put the furs in his basement.

At worst, and more probably, petitioner is being punished for a crime which someone else very probably committed. The government agent has sworn in his affidavit, for what that is worth, that the furs were stolen by certain of Leo's associates. Leo had unrestricted access to petitioner's home for several weeks during petitioner's vacation, shortly prior to the discovery of the furs. He went to petitioner's neighbors and told them not to worry if they saw people in petitioner's home during the vacation, and not to call the police (A. 28).

But the prosecution had evidence only against petitioner. He was very probably innocent, but he could be used as a means of reaching Leo. It would be possible to prosecute him, punish him severely (he is, after all, a Rugendorf), and force Leo to admit his guilt out of concern for his brother.

Of course, such reasoning depends, for its effectiveness, upon the possession by Leo of a sense of moral responsibility far superior to that of the police authorities. In the final analysis, however, we must accept the prosecutor's evaluation of this aspect of the case, just as with all other facets of the litigation.

• • •

II.

May a conviction on a charge of receiving stolen property, Title 18 U.S.C. Sec. 2315, be predicated entirely and solely upon proof that stolen property was found on premises partially owned and partially occupied by defendant, but to which a number of others also had access?

It has never been expressly decided that one who violates Section 2315 by receiving, concealing, or storing stolen property, must do so knowingly. But if knowledge was an issue in this case, certain it is that there was no shadow of evidence on that issue.

Petitioner came into court with a background of hard and honest work, and a spotless reputation, achieved over a span of 55 years.

The government came into court with a stipulation that furs valued at more than $5,000.00 had been stolen outside Illinois, and with proof that they had been found concealed in petitioner's basement.

This was the government's entire presentation before the jury. And it must be judged in the light of certain highly relevant and uncontested facts. The defendant and his wife were absent from Chicago on vacation for a period of two weeks, beginning about one week after the completion of the theft. (A. 30, 39.) They left keys to their home, for emergency purposes, with a number of people: their son; petitioner's sister; a neighbor (A. 30, 39). They also left a key with petitioner's brother, Leo (A. 30, 39). And Leo was a "fence". (A. 30)

The day following petitioner's departure, Leo came into the neighborhood. He told a neighbor, Mrs. Lamm, not to worry if she saw lights in petitioner's house, because he, Leo, had a key (A. 28).

An agent and affiant for the government took solemn oath that he had reliable information that the furs had been stolen by criminal associates of Leo, and that Leo's function was to dispose of goods stolen by the thieves. (A. 7, 8)

There is no evidence that petitioner ever saw the furs prior to his arrest. There is no evidence generating so much as an inference that he knew they were in his basement.

The Court of Appeals' opinion which we ask your Honors to review, suggests that material fact issues were presented to the jury. The record will not support that assertion. The only evidentiary conflict was whether Leo had returned the keys when petitioner returned from his vacation. The government urges that the jury resolved this issue against petitioner, and argues that it is illogical to believe:

> " . . . that Leo would have placed the furs in the basement and then given away his only means of taking the furs out of the basement by returning the key to defendant . . . " (Government brief in Court of Appeals, p. 7)

The Court of Appeals has elevated this argument to the dignity of plurality, by its reference to "stubborn *facts* plainly pointing to [petitioner's] guilt."

The patent impossibility of copying a residence key at any price less than 25¢, imparts to that argument such cogency as your Honors may deem it to possess.

Not only is it far more probable that Leo is the offender; it is the simple, if absurd, fact that the case against petitioner's wife is much stronger than the case against petitioner. Petitioner's wife managed the home, and lived there throughout the day (A. 32). Petitioner merely slept there, on the normal working day (A. 39).

Assuredly, petitioner's wife is no more guilty than petitioner. The real offender was almost certainly Leo, or some other person known to the nameless informant whose identity was guarded from petitioner's inquiries. But a much stronger case, although still inadequate to support conviction, could have been made against petitioner's wife, than was made against petitioner.

The outcome of this litigation to this time cannot be pleasant to petitioner's wife. But she may at least take solace in the fortunate circumstance that she was not born as Leo's sister.

• • •

If Section 2315 requires that the concealment or storage of stolen goods must be knowingly done in order to be criminal—and this is the obvious intent of the Statute—this would be an exceptionally felicitous occasion, from Petitioner's standpoint, for the clarification of that principle.

If Section 2315 does not so require, it would likewise be helpful if that fact were made clear, in order that the citizenry may be alerted to the necessity of periodic and systematic inspections by them of their residences, business quarters and vehicles to assure that all is in readiness if the police should come.

And if being the brother of a suspected criminal, entitles the government to use one as a pawn in the "war against crime", it is high time we all stopped pretending to the contrary, and abandoned our time-wasting academic discussions concerning individual rights and dignity.

CONCLUSION.

We respectfully submit that no more obvious miscarriage of justice is likely to come before your Honors, than the case here sought to be reviewed. We further doubt that your Honors are prepared to countenance the glib slogans which have been used as a pretext to deny to petitioner the right to demonstrate his innocence. The "informer privilege" has here been carried to the point where it has effectively circumvented the Constitutional privilege to know and confront one's accuser, and to be safe against unreasonable search.

We pray that your Honors will consider this a fit case to warrant this Court's attention.

Respectfully submitted,

MELVIN B. LEWIS
JULIUS LUCIUS ECHELES
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Attorneys for Petitioner

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 13967 SEPTEMBER TERM 1962—APRIL SESSION 1963

UNITED STATES OF AMERICA,
Appellee,
v.
SAMUEL JOSEPH RUGENDORF,
Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 30, 1963

Before DUFFY and KNOCH, *Circuit Judges,* and MERCER, *District Judge.*

DUFFY, *Circuit Judge.* Defendant was tried before a jury and was convicted of receiving, concealing and storing goods, wares and merchandise of a value in excess of $5,000, knowing the same had been stolen and transported in interstate commerce in violation of Section 2315, Title 18, United States Code. The goods were identified in the indictment as 81 fur pieces which had been stolen in Shreveport, Louisiana and Mountain Brook, Alabama, and which had moved in interstate commerce from Shreveport and Mountain Brook to Chicago, Illinois.

On this appeal, defendant argues (1) the evidence was insufficient to sustain the verdict of guilty; (2) the trial court erred in overruling defendant's motion to suppress the evidence, and (3) the trial court erred in refusing to require the government to reveal the source of the information contained in the affidavit, pursuant to which a search warrant was issued.

Defendant and his wife owned and occupied a two-story brick, single family dwelling in the City of Chicago. The basement was partitioned into two sections by a wall running east and west. The rear or south part contained two smaller rooms, one of which was a laundry and furnace room, and the other a general storage room. In the northern section, there was a nicely finished recreation room. At the east wall of this room there was a business-type desk with a telephone. In the center of the room was a card table and sewing machine. There were closets built into the north wall. During the search, Agent McCormick opened the doors to these closets, and in the last one discovered 81 furs hanging on individual wire hangers which hangers were on a rod that extended the length of the closet. The labels had been torn out of the garmens. There were, in fact, 82 fur pieces, but Mrs. Rugendorf, the wife of defendant, identified one of the fur pieces as belonging to her.

Defendant's wife testified that she and her husband left Chicago on the evening of February 17, 1962, for a vacation in Florida and Nassau; that they returned to Chicago on March 4, 1962; that during the period of their absence, her brother-in-law, Leo Rugendorf, her son, her sister-in-law and one Roskin all had keys to the house. She testified the defendant did not go into the basement between March 4, and March 22. The defendant gave similar testimony and in addition testified he had no occasion prior to

February 17, 1962, to go to the basement or to look at the closets. There also was testimony that defendant's brother, Leo, was a well-known "fence."

There is no dispute that on March 22, 1962, agents of the Federal Bureau of Investigation found in the basement of defendant's home, the loot of two burglaries, one of which occurred at Shreveport, Louisiana, December 4 and 5, 1961, and one at Mountain Brook, Alabama, on February 10, 1962.

There were a number of conflicts in the evidence which the jury was entitled to and did resolve. To illustrate, defendant testified that before he left on his vacation, he gave the key to his house to his brother Leo and that the key had not been returned. Agent Lee testified that when defendant was arrested he stated that Leo came into defendant's place of business shortly after he had returned from Florida and returned the key to him.

The situation in the case at bar is somewhat similar to that in *United States* v. *Mann*, 7 Cir., 108 F. 2d 354, 358, where we said: "Here, the jury rejected defendant's professions of innocence in the face of stubborn facts plainly pointing to his guilt."

Knowledge of the stolen character of the goods may be established by circumstantial evidence. *United States* v. *O'Brien*, 7 Cir., 174 F. 2d 341; *United States of America* v. *Allegrucci*, 3 Cir., 258 F. 2d 70.

We hold that the evidence, viewed in the light most favorable to the government, clearly supports the conviction of the defendant.

Defendant argues that the affidavit which was the basis of the issuance of the search warrant was based on hearsay information and therefore insufficient. Defendant relies upon *Jones* v. *United States*, 362 U. S. 257.

Agent Moore of the F. B. I. swore that an informer who had furnished reliable information in the past reported to affiant that he had seen 30 fur garments in defendant's basement a few days previously, describing them as mink, otter and beaver jackets, with labels removed, and that the informant had been told the furs were stolen.

We think defendant's reliance upon *Jones* v. *United States, supra,* is misplaced. We quote the following from the opinion in that case (pages 270-271): ". . . In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

"We conclude therefore that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay here that the Commissioner acted improperly . . . But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. . . ."

In *United States of America* v. *Eisner,* 6 Cir., 297 F. 2d 595, 596, the Court, relying on the *Jones* case, upheld the sufficiency of an affidavit which stated " 'Informaiton has been obtained by S. A. Clifford Anderson, F. B. I., Cincinnati, Ohio, which he believes to be reliable to the effect that Sam Eisner received furs which were a part of the loot from the Davidson Indiana Fur Co. in Ky., after they had been transported from Indianapolis, and had knowledge that they had been stolen.' " It will be noted that the affidavit in the case at bar is quite similar to that approved in the *Eisner* case.

We hold there was no abuse of discretion on the part of the Commissioner in issuing the search warrant. There was present a sufficient basis for the determination by the Commissioner of the existence of probable cause.

The remaining point raised by defendant as error is the refusal of the trial court to require the disclosure of the name of the informer. The defendant relies on *Roviaro* v. *United States,* 353 U. S. 53.

At the trial, when the prosecutor refused to disclose the name of the informer, he stated the ground of his objection was "because it would cause a possible murder." Involved here is what has often been termed the "informer's privilege." However, it is the privilege, if any, of the government to withhold the names of persons who have supplied information leading to the detection of crime and the apprehension of the criminal.

The Supreme Court, in the early case of *In re Quarles and Butler,* 158 U. S. 532, 535-536, stated: " . . . and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. . . ."

However, an exception to this rule was stated in *Roviaro* v. *United States,* 353 U. S. 53, 60-61. The Court there held that when the disclosure of the name of the informer is "relevant and helpful to the defense of an accused, or is essential to a fair determinaiton of a cause, the privilege must give way." The Supreme Court further stated in *Roviaro* v. *United States, supra,* at page 62: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. . . ."

In *Roviaro*, the informer was the only person, other than the defendant, who participated in the transaction charged in the indictment. He was the only witness other than the defendant who could have disclosed entrapment, if any.

In *Jones* v. *United States of America*, DC Cir., 271 F. 2d 494, 496, fn. 3, cert. den. 362 U. S. 918, the Court had for decision the question of whether it was error to fail to disclose the name of the confidential informant, when it was his information, relayed through another agent, that was the basis of establishing probable cause. The Court there said that *Roviaro* was applicable only when the informer "*'helped to set up the commission of the crime and . . . was present at its occurrence.'* . . .(Emphasis added.)"

The Courts of Appeal of several Circuits have considered the reach of Roviaro but have, nevertheless, upheld the action of trial courts in refusing to compel the government to disclose the name of the confidential informant.

In *Miller* v. *United States of America*, 5 Cir. (1959), 273 F. 2d 279, cert. den. 362 U. S. 928, the trial court had refused to require the government to disclose the name of the informant who had furnished the information giving the officers probable cause to arrest without a warrant. The Court of Appeals discussed *Roviaro* and also *Gilmore* v. *United States of America*, 5 Cir., 256 F. 2d 565, and stated at page 281: "We think that the circumstances of this case differs crucially from those cases in which disclosure was required. We hold that it was not error to refuse to require the Government to divulge the identity of its source of information . . . We are not dealing with one who was an active participant in the crime . . . and one who would have been able to testify directly about the very transaction constituting the crime . . . We think all the evidence discloses is that the informer was an informer and nothing more."

In a recent case, the Fourth Circuit, in *United States of America* v. *Whiting*, 311 F. 2d 191 (1962), refused to compel the government to disclose the name of a confidential informant who had furnished information leading to the obtaining of a search warrant. The Court said at page 196: "In the present case, however, we have no such situation for, as the attorney for the defendants admitted, the names of the informers were wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case."

We hold it was not error for the trial court to refuse to compel the government to disclose the name of its confidential informant.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

Friday, May 24, 1963

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Frederick O. Mercer, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13967 vs.

SAMUEL JOSEPH RUGENDORF,
Defendant-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby Denied.

APPENDIX "C"

In the

United States Court of Appeals

For the Seventh Circuit

Statutes Involved.

Title 18 United States Code, Section 2315, provides in relevant part:

> "Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken • • •
>
> • • •
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."